

CAMPBELL & WILLIAMS  
DONALD J. CAMPBELL, ESQ. (1216)  
J. COLBY WILLIAMS, ESQ. (5549)  
JACK F. DEGREE, ESQ. (11102)  
700 South Seventh Street  
Las Vegas, Nevada 89101  
Telephone: (702) 382-5222  
Facsimile: (702) 382-0540  
and  
HUNTERTON & ASSOCIATES  
C. STANLEY HUNTERTON, ESQ. (1891)  
333 S. Sixth Street  
Las Vegas, Nevada 89101  
Telephone: (702) 388-0098  
Facsimile: (702) 388-0361

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

KIRK and AMY HENRY, )  
)  
Plaintiffs, )  
)  
vs. )  
)  
FREDRICK RIZZOLO aka )  
RICK RIZZOLO, an individual; )  
LISA RIZZOLO, an individual; )  
THE RICK AND LISA RIZZOLO )  
FAMILY TRUST, )  
)  
Defendants. )  
\_\_\_\_\_ )

Case No. 2:08-cv-635-PMP-GWF

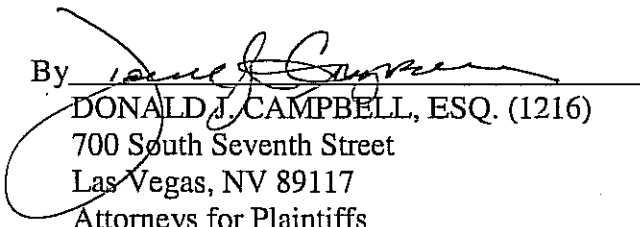
**PLAINTIFFS MOTION TO COMPEL  
PRODUCTION OF DOCUMENTS  
IN RESPONSE TO RULE 45 SUBPOENA  
AND FOR CONTEMPT ORDER**

COMES NOW Plaintiffs KIRK and AMY HENRY, by and through their attorneys of record, DONALD J. CAMPBELL, ESQ. and JACK F. DEGREE, ESQ., of the law firm CAMPBELL & WILLIAMS, and hereby file the following Motion to Compel Production of Documents in Response to a Rule 45 Subpoena and for Contempt Order.

1  
2 This motion is made and based upon all the pleadings and papers on file herein,  
3 together with the affidavits and exhibits attached hereto, and any and all oral arguments.

4 DATED this 17<sup>th</sup> day of November, 2008.

5 CAMPBELL & WILLIAMS

6  
7 By   
8 DONALD J. CAMPBELL, ESQ. (1216)  
9 700 South Seventh Street  
10 Las Vegas, NV 89117  
11 Attorneys for Plaintiffs  
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**POINTS AND AUTHORITIES**

**I. INTRODUCTION**

On September 30, 2008, Plaintiffs caused a Rule 45 subpoena to be served on the Custodian of Records of the law firm Patti, Sgro & Lewis. *See* Subpoena, attached hereto as Exhibit "1." It required the custodian to appear at the law offices of Campbell & Williams for deposition testimony and the production of documents on October 27, 2008. The subpoena commands the following production:

Copies of checks, records of payment, billing invoices, engagement letters, and transmittal sheets for services performed on behalf of Fredrick Rizzolo, Lisa Rizzolo, Rick and Lisa Rizzolo Family Trust, The Power Company, Inc. and/or other related business entities between 09/20/2001 and the present. *See* Exhibit 1.

However, Defendant's counsel wrote Plaintiffs' counsel late in the afternoon on October 24, 2008, advising no appearance would be made for the deposition. *See* Letter from Mark Hafer, attached hereto as Exhibit "2." Instead, counsel incorrectly sought compliance by producing documents "that are responsive to the subpoena...along with a certificate of authenticity on or before November 3, 2008." *See* Exhibit 2. Counsel failed to produce any documents or the custodian of records for deposition testimony, which went forward at the noticed time with court reporter costs on October 27, 2008.<sup>1</sup> *See* Deposition of Custodian of Records for Patti, Sgro & Lewis, attached hereto as Exhibit "3." The next day, Plaintiff's responded to Defendant's counsel concerning the production unilaterally set by Defendant's counsel for November 3, 2008. In short, Defendant's counsel was made abreast that this course of action was "not acceptable and does not comply with the subpoena." *See* Letter from Donald Campbell, attached hereto as Exhibit "4."

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<sup>1</sup> Mr. George P. Kelesis, Esq., appeared for Defendant Lisa Rizzolo during this deposition.

1  
2 The deposition was re-noticed with the subpoena attached. Tim Amico appeared as the  
3 Custodian of Records for Patti, Sgro & Lewis at the second deposition on November 3, 2008.  
4 See Deposition of Tim Amico, attached hereto as Exhibit "5." Mr. Hafer asserted Nevada Rule  
5 of Professional Conduct ("NRPC") 1.6 for objecting to both the deposition and the production  
6 commanded in the subpoena. See Exhibit 5 at 11:22-12:11. He then followed this objection by  
7 producing copies of checks and billing records dating back to only 2006. Additionally, a  
8 significant amount of content is redacted from the documents; this information was "blackened  
9 out" on the face of each document.  
10

## 11 II. ARGUMENT

### 12 A. Objection to the Rule 45 Subpoena is Untimely

13 All objections are waived. A nonparty wishing to object to a subpoena duces tecum  
14 may do so by written objection or by moving the district court for a motion to quash or modify.  
15 See *Unigene Laboratories, Inc. v. Apotex, Inc.*, 2007 WL 2972931 at \*2 (October 10, 2007  
16 N.D.Cal.), a copy of which is attached hereto as Exhibit "8." The nonparty wishing to embrace  
17 either of these procedures must do so "before the earlier of the time specified for compliance or  
18 14 days after the subpoena is served." Fed. R. Civ. P. 45(c)(2)(B). "A nonparty's failure to  
19 timely make objections to a Rule 45 subpoena duces tecum generally requires the court to find  
20 that any objections have been waived." *Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 635  
21 (C.D.Cal. 2005) citing *In re DG Acquisition Corp.*, 151 F.3d 75, 81 (2d Cir. 1998); *Creative*  
22 *Gifts, Inc. v. UFO*, 183 F.R.D. 568, 570 (D.N.M. 1998). Alternatively, the person commanded  
23 to appear and produce documents (or the adverse party) may move the district court for a  
24 protective order. *Id.* However, these procedural protections "must be made promptly,"  
25 allowing [them] to "be heard and granted before the scheduled deposition." *Unigene*, 2007  
26  
27  
28

1  
2 WL 2972931 at \*2 citing The Rutter Group, *Federal Civil Procedure Before Trial*, § 11:2288  
3 (2007).

4 No objection was asserted prior to the deposition; no motion to quash or modify was  
5 ever filed; no protective order was ever sought prior to the scheduled deposition. This is  
6 improper. Service of the Rule 45 subpoena was effectuated on September 20, 2008. See  
7 Exhibit 1. *Timely objection was required no later than October 14, 2008.* (emphasis added).  
8 Patti, Sgro and Lewis did nothing. Rather, the obligations imposed by the subpoena were cast  
9 aside. As a result, Plaintiff was forced to encumber additional expenses in seeking full  
10 disclosure, including but not limited to, court reporter costs for two depositions and the instant  
11 motion.  
12

13 **B. Further Noncompliance Warrants a Contempt Order**

14 This court should order the Custodian of Records to produce all documents requested in  
15 Plaintiff's subpoena. In the absence of any adequate excuse, further non-compliance subjects  
16 the nonparty custodian to contempt of court. FRCP 45(e); *Pennwalt Corp. v. Durand-*  
17 *Wayland, Inc.*, 708 F.2d 492, 494 (9th Cir. 1983) (after production is ordered, further  
18 noncompliance by a nonparty will result in civil contempt and the imposition of appropriate  
19 sanctions); *R.L. Fisher v. Marubeni Cotton Corp.*, 526 F.2d 1338 (8th Cir. 1975) (in response  
20 to subpoena duces tecum, if nonparty "was in fact errant without 'adequate excuse,' the proper  
21 course was to find him in contempt under Rule 45(f).").<sup>2</sup> Mr. Hafer wrongfully asserts NRPC  
22 1.6 to obstruct Plaintiffs' narrowly tailored discovery request. NRPC 1.6 reads, in relevant  
23 part:  
24  
25  
26

27 <sup>2</sup> The Advisory Committee notes in Fed. R. Civ. P. 45 state subsection (f) no longer exists.  
28 However, the substantive language of subsection (f) is retained in subsection (e) since the 1991  
amendments to the Rule.

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent...or the disclosure is permitted by paragraphs (b) and (c).

(b) *A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:*

\* \* \* \*

(6) *To comply with other law or a court order.*

(emphasis added). The common law is at odds with the position espoused by Mr. Hafer.

It is long settled a party claiming a privilege must identify specific communications and each ground which supports the claim of privilege as to every piece of evidence for which the privilege is asserted. *United States v. Osborn*, 561 F.2d 1334, 1339 (9th Cir. 1977). Blanket assertions of privilege are "extremely disfavored." *Clarke v. Am. Commerce Nat'l Bank*, 974 F.2d 127, 129 (9th Cir. 1992). Moreover, the communication must be between the client and the lawyer for the express purpose of obtaining legal advice. *United States v. Plache*, 913 F.2d 1375, 1379 n. 1 (9th Cir. 1990).

Plaintiff seeks an order compelling production of documents directly relevant to proving Plaintiff's multiple causes of action.<sup>3</sup> Further, Mr. Hafer represents "that these are the only documents in the possession of the law firm that are responsive to the subpoena." See Exhibit 5 at 12:24-13:1. This misrepresents the facts. The law firm of Patti, Sgro & Lewis has

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<sup>3</sup> In Plaintiffs' complaint, it is asserted that numerous transactions involving the Rizzolo entities are fraudulent and violate The Uniform Fraudulent Transfer Act ("UFTA"). See Complaint, attached hereto as Exhibit "6." The UFTA was adopted in Nevada in 1987. See NRS 112.140. The Rizzolo divorce, in particular, is one of the main component transfers used by the Rizzolos to hinder, delay, and defraud Plaintiff's collection of the settlement. *The Rizzolos were jointly represented by Patti, Sgro & Lewis in the divorce, which culminated with the attached divorce decree.* (emphasis added). See Divorce Decree, attached hereto as Exhibit "7." The documents in possession of the firm lend credence to Plaintiff's theory and were wrongfully withheld at the custodian of records deposition on November 3, 2008.

1  
2 represented the Rizzolos and affiliated individuals and entities on countless numbers of legal  
3 matters over the course of many years.<sup>4</sup>

4       **C.     The Documents are Not Protected from Disclosure**

5       Mr. Amico, as custodian, acknowledged the substance of what was sought and the  
6 affirmative obligation imposed in that regard. *See* Exhibit 5 at 10:10-10:17. As will be more  
7 detailed, *infra*, the production came nowhere near compliance on any level because: (1)  
8 documents were not produced, (2) non-compliant production did not date back to the date  
9 commanded in the subpoena (September 20, 2001), (3) information was inappropriately  
10 redacted, and (4) organizational standards of Rule 45 were not met. Notwithstanding Mr.  
11 Hafer's untimely assertion of NRPC 1.6, the common law authority discussed herein holds the  
12 documents are not subject to any privilege. As a result, the firm of Patti, Sgro & Lewis should  
13 have produced with full disclosure "*to comply with other law.*" NRPC 1.6(b)(6) (emphasis  
14 added).  
15

16               o *Billing Statements*  
17

18       Billing records, absent some extraordinary justification to the contrary, may be obtained  
19 in the course of civil discovery. *See Renner v. Chase Manhattan Bank*, 2001 WL 1356192  
20 (Nov. 2, 2001 S.D.N.Y.), a copy of which is attached hereto as Exhibit "9." In *Renner*, the  
21 court held that "billing records that attorneys submit to clients are generally discoverable,  
22 unless production will necessarily reveal client confidences." *Id.* at \*8. While the objecting  
23 party declared there to be a "detailed description of services rendered," the court found that the  
24

25  
26 <sup>4</sup> Mr. Hafer's assertion that "these are the only documents in the possession of the law firm  
27 that are responsive to the subpoena" begs the question. *See* Exhibit 5 at 12:24-13:1. Does the  
28 firm of Patti, Sgro & Lewis engage in the joint representation of a married couple pursuing a  
divorce involving millions in assets, yet all the while not retain a single document pertaining  
thereto?

1  
2 records at issue involved "a relatively terse chronological recitation" that gave no details with  
3 respect to the communications involved. *Id.* A similar holding was announced by the Ninth  
4 Circuit in *Clarke, supra*:

5 "The statements contain information on the identity of the client, the  
6 case name for which payment was made, the amount of the fee, and the  
7 general nature of the services performed. Our previous decisions have  
8 held that this type of information is not privileged. *See, e.g., Salas*, 695  
9 F.2d at 361; *Cromer*, 483 F.2d at 101-02. We find nothing in the  
statements that reveals specific research or litigation strategy which  
would be entitled to protection from disclosure."

10 974 F.2d at 130; *See also Bieter Company v. Blomquist*, 156 F.R.D. 173, 180 (D.Minn. 1994)  
11 (attorney billing statements were protected by neither work product nor attorney/client  
12 privilege since they were nothing more than descriptions of legal services performed and,  
13 therefore, were subject to discovery); *Chesapeake & Ohio Railway Co. v. Kirwan*, 120 F.R.D.  
14 660, 665 (S.D.W.Va. 1988) (billing statements containing a description of work performed  
15 were not protected by attorney/client privilege). In this case, billing statements dating back to  
16 September 20, 2001, should have been produced without any redactions. They were not. *See*  
17 Exhibit 5 at 15:16-18.

18  
19 ○ *Copies of Checks*

20 Checks and bank records are also not protected by the attorney-client privilege. *Harris*  
21 *v. United States*, 413 F.2d 316, 319 (9th Cir. 1969). "These items were negotiable instruments  
22 in commerce and were never confidential from the time of their creation." *Id. citing United*  
23 *States v. Judson*, 322 F.2d 460, 463 (9th Cir. 1963). The redactions on the Rizzolo checks are  
24 not justified since the attorney-client privilege does not extend to this information. This  
25 information is not confidential because the Rizzolos knew that by writing the check "it would  
26 set afloat on a sea of strangers." *Id.* Therein lies the point. The Rizzolos and their  
27  
28



1  
2 representatives at Patti, Sgro & Lewis knew the check would be viewed by countless numbers  
3 of individuals at their respective banks and the clearing house, eliminating any confidentiality.  
4 *Id.* As such, checks dating back to September 20, 2001 should have been produced without  
5 any redactions. They were not. *See* Exhibit 5 at 14:8-14.

6  
7       ○ *Engagement Letters*

8       The engagement letters for all services rendered by the firm for Rizzolo and the related  
9 individuals and entities are not protected. *United States v. Boulware*, 203 Fed.Appx. 168, 170  
10 (9th Cir. 2006). "As a general rule, client identity and the nature of the fee arrangement  
11 between attorney and client are not protected from disclosure by the attorney-client privilege."  
12 *United States v. Blackman*, 72 F.3d 1418, 1424 (9th Cir. 1995) *quoting* *Ralls v. United States*,  
13 52 F.3d 223, 225 (9th Cir. 1995); *see also In re Michaelson*, 511 F.2d 882, 893 (9th Cir. 1975)  
14 (applying Nevada law) ("information concerning fee arrangements between an attorney and his  
15 client" are not protected by the attorney-client privilege). No engagement letters were  
16 produced; not even one reflecting the joint representation in the Rizzolo divorce. *See* Exhibit 5  
17 at 17:21.

18  
19       ○ *Transmittal Sheets*

20       These previous holdings concerning document production in response to a Rule 45  
21 subpoena are not limited to billing statements. Rather, they extend to transmittal sheets as  
22 well. *See Miller v. Pruneda*, 2004 WL 3951292 (Nov. 5, 2004 N.D.W.Va.) (a copy is attached  
23 hereto as Exhibit "10") ("fax transmittal sheets are not protected" and the information sent is  
24 only privileged under the attorney-client privilege if "the information is advice sought by the  
25 client from his attorney in his capacity as a legal adviser."); *Shaffer v. Northwestern Mut. Life*  
26 *Ins. Co.*, 2006 WL 2432110 (August 21, 2006 N.D.W.Va.) (a copy is attached hereto as  
27  
28

1  
2 Exhibit "11") ("[transmittal communications] are not protected by the work product doctrine  
3 because they were not prepared in anticipation of litigation."). Patti, Sgro & Lewis would be  
4 hard pressed to contend no transmittal sheets existed.<sup>5</sup> In any event, none were produced. *See*  
5 Exhibit 5 at 18:7.

6  
7 **C. Other Justifications for a Contempt Order**

8 The subpoena expressly commanded production of all documents dating back to  
9 September 20, 2001, which is the date of the underlying incident giving rise to a number of  
10 legal proceedings. The few documents produced only date back to 2006. The divorce decree  
11 was executed in June 2005. *See* Exhibit 6. Also, the documents that were produced did not  
12 meet the standards set forth in Fed. R. Civ. P. 45(d)(1)(A) which require a "person responding  
13 to a subpoena...to organize and label them to correspond to the categories in the demand."  
14 There were no Bates stamps and material information was blackened out on both the checks and  
15 billing records. When counsel attempted to conduct a meet and confer discovery conference  
16 on the record regarding the information blackened out, Defendant's counsel insisted on an off  
17 the record discussion. Accordingly, Plaintiff's counsel made the following record after  
18 consulting with Defendant's counsel:  
19

20 "We just conducted a meet and confer pursuant to the Federal  
21 Rules of Civil Procedure.

22 I have been informed by Mr. Hafer that, with respect to the  
23 checks, the matters that have been blackened out and redacted are  
24 account numbers, routing numbers on the checks, as well as the name of  
25 account holders.

26 <sup>5</sup> In response to Plaintiff's First Set of Requests for Production, the Defendant produced  
27 thousands of pages of documents, none of which appears relevant to the instant suit. However,  
28 included in this production were countless numbers of transmittal sheets with messages  
documenting the precise documents included within each fax. Therefore, it is evident Patti,  
Sgro & Lewis in fact maintain transmittal sheets despite Mr. Hafer's assertion to the contrary.

1  
2 With respect to the billing statements, all that did not relate to the  
3 Rizzolo divorce and/or the Crazy Horse suit, I'm not sure which one that  
4 is, have been redacted as well.

5 *The records, according to Mr. Hafer, only go back to, I guess*  
6 *this is '06 or so, is because the record keeping in Patti & Sgro is – to*  
7 *use his words – chaotic and that they have moved.*

8 We believe that this production is woefully inadequate. We  
9 believe that documents are being withheld from us. We further believe  
10 that there has not been a diligent search for the records that would be  
11 compliant with that required under the Federal Rules of Civil  
12 Procedure.”

13 See Exhibit 5 at 20:15-21:10 (emphasis added).

14 The custodian should be ordered not only to produce organized copies of the documents  
15 dating back to the relevant date, but unredacted versions as well. When the basis is unclear for  
16 the redaction, the court will compel the production of unredacted copies. See *Security Ins. Co.*  
17 *of Hartford v. Trustmark Ins. Co.*, 218 F.R.D. 29, 35 (D.Conn. 2003) (when defendant claimed  
18 the redactions were relating to information not relevant to the instant suit, the court required an  
19 in camera inspection). The aforementioned inadequacies only add to the dilatory tactics  
20 employed by Defendant's counsel.

### 21 **III. CONCLUSION**

22 Accordingly, it is respectfully requested that Patti, Sgro & Lewis be directed to produce  
23 said documents forthwith so that the Plaintiffs may conduct additional, meaningful discovery  
24 relating to the legal representation of Rick Rizzolo, Lisa Rizzolo, Rick and Lisa Rizzolo  
25 Family Trust, The Power Company, Inc., and any other related individuals or entities, in  
26 addition to an

27 ....

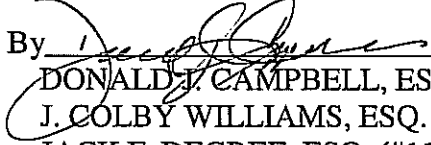
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....

Order holding Patti, Sgro & Lewis in contempt.

DATED this 17<sup>th</sup> day of November, 2008.

CAMPBELL & WILLIAMS

By   
DONALD J. CAMPBELL, ESQ. (#1216)  
J. COLBY WILLIAMS, ESQ. (#5549)  
JACK F. DEGREE, ESQ. (#11102)  
700 South Seventh Street  
Las Vegas, NV 89101  
Attorneys for Plaintiffs